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IN THE

Supreme Court of the United States

No. 96

October Term, 1932.

THE UNITED STATES OF AMERICA,

Petitioner,

v.

GREAT NORTHERN RAILWAY COMPANY,

Respondent.

On a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF RESPONDENT GREAT NORTHERN RAILWAY COMPANY.

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St. Paul, Minnesota,
September 30, 1932.

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STATEMENT.

NOTE: References to Section 209 and sub-paragraphs and to Section 212 throughout the following discussion are to the Transportation Act of 1920, 41 Stat. L. 464 and 1145, pertinent portions of which are set forth in the Appendix.

Comparison of the Commission's Two Computations.

On February 28, 1921, the Commission's Bureau of Finance transmitted its report to the Commission stating, "We have examined the data submitted by the applicant and find that the Government would have to pay *not less than $15,705,688*, to make good the guaranty, of which $6,500,000 has already been advanced * * *. Balance ascertained to be due carrier

$9,205,688 * * *. Upon the showing above indicated partial payment of $6,000,000 is recommended to be issued * * *." (Italics ours.) These quotations are from defendant's Exhibit C, appearing near the bottom of pages 215, 216 and 217 of the transcript.

This computation followed a year's intensive study of the subject by the Commission and was made a month after the Commission had commenced to make final settlements with other carriers (R. 62, 72).

Upon reciving the above report, the Commission issued its certificate of March 1, 1921, under Section 209(g) as amended by Section 212, in which it "ascertained and hereby certifies to the Secretary of the Treasury that the amount of $6,000,000 *in addition to any other sum or sums heretofore certified* in favor of the carrier under Section 209 of the Transportation Act 1920, is necessary to make good to said carrier the guaranty provided by the said section. The Commission hereby certifies that such amount of $6,000,000 *cannot be reduced by further accounting or otherwise*, and there may be, upon further investigation, additional amounts found due to said Great Northern Railway Company * * *." (Italics ours.) (Government's Exhibit 1, page 5, R. 135, 136.) This $6,000,000 plus the $6,500,000 previously advanced, made a total payment of $12,500,000.

More than five years later on June 8, 1926, the Commission issued a final certificate under Section 209(g), that the "amount necessary to make good to said Great Northern Railway Company the guaranty * * * is eleven million one hundred seventy thousand two hundred fourteen dollars and two cents ($11,170,214.02)". (Government's Exhibit 1, page 11, R. 142). We have already seen that the report of February 28, 1921, computed the amount of our guaranty at $15,705,688.

It thus appears that the certificate of 1926 eliminated the tremendous sum of $4,535,473.98 from the amount which had previously been computed.

In computing the carrier's railway operating income under the Guaranty Act, the Commission, instead of deducting the carrier's *actual* maintenance expenses from its revenues, was to determine a maximum amount to be allowed for maintenance expenses (Transportation Act, Section 209(f) (3).)

The carrier's actual expenditures for maintenance during the Guaranty Period amounted to $28,892,000. No specific item in this amount was ever criticized, but the Commission's theoretical computations produced much smaller sums as the proper allowance for maintenance. The amount allowed for maintenance in computing our partial payment of $6,000,000 on March 1, 1921, was $27,233,000 or more than one and a half million dollars less than our actual expenses. In making the final certificate of June 8, 1926, the amount allowed for maintenance was only $23,815,000, so that in this case, the theoretical computation produced an amount more than five million dollars less than our actual expenses, and about three and a half million dollars less than the amount computed in making the partial certificate (R. 108). This means that under the Commission's final certificate, the carrier would be compelled to bear five million dollars of its maintenance expenses during the Guaranty Period out of its own funds, thus shrinking its guaranty compensation to that extent.

Between the dates of these two conflicting findings, the personnel of the Commission had very greatly changed, seven of the eleven Commissioners who joined in the final certificate of 1926 having become members since the date of the partial certificate of March 1, 1921, so that the later certificate was not made by a more experienced Commission. This appears from

the annual reports of the Commission. Only four of the Commissioners who made the partial certificates remained upon the Commission when the final determination was made.

There was a difference of $4,535,473.98 between the $15,705,688 determined upon as the amount of our guaranty in the Bureau report of February 26, 1921 (Exhibit C, R. 215) and the $11,170,214.02 named in the final certificate; and a difference of $1,329,785.98 (the amount sued for in this case) between the final certificate and the $12,500,000 certified to by the Commission on March 1, 1921, and actually paid. The Government offered no evidence as to what the items of this difference consisted of and did not produce the detailed work sheets or computations by which either the larger amounts or the smaller one were produced. The Government does not attempt to put the court in a position where it can determine for itself whether any errors were made in either figure. The only explanation of the differnce is that the Commission, as constituted on June 8, 1926, the date of the final certificate, had adopted different methods of computation (which are not described in detail and the correction of which the court is not asked to pass upon) from those used in reaching the larger amount.

However, we can gather from the record the following explanation of what must appear to be a ridiculously wide departure in the final certificate, not only from the Commission's original computation but from the carrier's actual expenditures. In fixing the allowance to each carrier for its maintenance expenses, the Commission was to start with that carrier's average six months' expenditure during the pre-war test period as a base, and to adjust this amount for (1) changes in the amount of property maintained, (2) changes in intensity of use of that property and (3) changes in cost of labor and

material, "so that the result shall be, as nearly as practicable, the same relative amount, character and durability of physical reparation" (Section 209(f) (3); Section 5(c) of Federal Control Contract, R. 155). Thus an expenditure of ten million dollars in the test period would be increased to eleven million dollars if 10% more property were maintained; and to $11,550,000 if there were a 5% greater intensity of use; and this amount would be doubled and fixed at $23,000,000 if costs of labor and material were found to be doubled. The making of these adjustments was the principal task before the Commission (R. 56).

In arriving at the original computation of $15,705,688 as the amount due us under the guaranty, various items of our test period expenses, such as the cost of maintaining locomotives, freight cars, passenger cars, track and other items of property were first segregated, and then the proper percentage of increase for each item was computed and applied separately (R. 98, 99). Similarly the percentage of increase in use of cars was computed separately for road haul, switching and loading (R. 103, 104). There were many different subdivisions or groupings in both the maintenance of way accounts and maintenance of equipment accounts, for each of which a separate precise factor of increase was computed and applied (R. 100).

On the other hand, in computing the amount of our *final* certificate, the Commission eliminated these refinements and accuracies. It grouped together not only all of the different classes of property of a single carrier but all the property of all the carriers in a territorial group. It declared that the test period expense of each carrier "shall be multiplied by a factor representing the increase in the general level of cost of labor and material for the territories in which the lines of railroad of the carrier are situated (R. 190). The allowance to

each carrier was to be fixed with reference to the increase in costs, not of its own labor and materials, but of those of other carriers. This factor was fixed "in the exercise of a reasonable judgment" rather than "upon the basis of any rigid rule or formula" (R. 190). The Commission said, "our territorial or regional factor represents our judgment of the composite increase in the general level of the prices of materials and wages of labor in the carrier's territory. It has not been and cannot be divided into separate factors * * *". (R. 194).

The amazing reduction in the amount computed to be due us from the original computation of $15,705,688 to $11,170,214.02 as computed five years later in the final certificate is explained largely by this abandonment of the method of precise computation and the resorting to "judgment" factors and general averages. For example, the substitution of the general territorial average increase in cost of labor and material for the precise increases applicable to each class of labor and material reduced our allowance by more than a million dollars (R. 106). By using one general average increase for all the difference uses of freight cars instead of the actual increase in each different kind of use, another reduction of more than a million dollars was effected (R. 104).

It should be pointed out here that no part of the alleged "overpayment" under our partial certificate resulted from the allowance of any *character of items* which the Commission subsequently rejected. In *Maintenance Expenses Under Section 209*, 70 I. C. C. 115, decided July 12, 1921, the Commission established the rule that no increase should be allowed to the carriers because of the so-called inefficiency of labor during the Guaranty Period, and that depreciation charges should be accrued during the guaranty period only on the basis of pre-war prices, which should not be equated. But at the time of the

making of our partial certificate, both of these questions were unsettled and the Commission accordingly *rejected all* claims for inefficiency of labor, as well as for increased depreciation, before making our partial certificate (R. 67). The reductions in the final certificate were due wholly to changed methods of calculation. The Government witness himself testified as follows:

> "That the difference between the original $15,000,000 and the final $11,000,000 was accounted for almost entirely by the application of the methods of calculating adopted by the Commission instead of the methods pursued by the defendant in submitting its return, and not because of errors or discrepancies in the defendant's return of February 14, 1921; that is, if the Commission had accepted the method followed by defendant in calculating its claim, the Government would have owed the defendant well over $12,500,000, and that the difference between the claim as filed by defendant and as allowed by the Commission grew out of a difference of opinion as to the method of calculation rather than out of errors in the figure submitted." (R. 79).

The Commission's own Bureau recognized that the previous methods of computation produced a result just as likely to be accurate as the later methods of calculation. In the case of the Chicago, Milwaukee and St. Paul Railway Company, a partial payment had been made based upon the method of precise increases applied to separate groups of expenses, just as in our case. When the Bureau came to apply the territorial factor, that factor indicated that the railroad had received an "overpayment" of $359,899.08. Notwithstanding this, the Bureau recommended against making any claim for refund "for the reason that it is believed that insofar as the determination of differences in cost of labor and material rests in the judgment

of the Commission, *its previous ascertainment for the purposes of partial payment was just as definite and valid upon the facts then considered as a subsequent determination made in the light of additional information.*" (Italics ours.) (Ex. E, R. 88, 89, memorandum from the Bureau to Division 4).

The reason why the application of precise rates of increase to separate groups of expenses produced a result in the Great Northern case so much higher than that produced by the territorial average is that an unusually large amount of the Great Northern's expenses fell within groups which were subject to high rates of increase. For instance, the ratio of labor to material was 241% on the Great Northern compared with an average of 197% for other roads in the territorial group, and the factor of increase for labor was sixty points above the factor for material. Similarly, maintenance of way expenses increased by a higher percentage than maintenance of equipment expenses and the Great Northern had a much higher percentage of maintenance of way expenses than the other roads in the district (R. 100, 101).

The Commission did not claim that the former methods of computation were inaccurate, or that any greater accuracy resulted from its more genral averages, but made the change rather to effect economy and speed. After adopting the method of a territorial average and calling for appropriate returns, it said, "These returns * * * will generally suffice for our final determination, and it will not be necessary to place upon the carriers the burden of expense and delay involved in any elaborate statistical compilation." *In the Matter of Final Settlement Under Section 209, etc.*, 70 I. C. C. 711 at 716 (R. 187). It was declared that "attempted refinements by segregation and separation of small classes of the innumerable items involved have only the appearance of greater accuracy. Unless

all items could be so segregated and separated, and the effect of changes in each computed independently, the result would no more nearly approach the truth than does the broad general principle under which we work" (R. 196). It also said, "We are of the opinion that no advantage of nearer approach to accuracy is to be had by attempting separate adjustments than by the method we follow" (R. 197). In other words, it appears from the Commission's own declarations that its later method was assumed to be as good as but not better than the former method and that it was adopted for the sake of expediency rather than accuracy.

The first announcement of the method of general territorial averages was made on December 15, 1921, *In the Matter of Final Settlement Under Section 209 of the Transportation Act 1920*, 70 I. C. C. 711. Prior to the adoption of this method, final settlement, had been made with five carriers. These were *final* settlements under Section 209(g) and were in addition to partial certificates which had then been issued to 215 carriers (35th Annual Report of the Interstate Commerce Commission for 1921, issued December 1, 1921, pages 23 and 211). The original method of figuring precise increases for separate subdivisions of the carrier's property had been applied in making final settlement with the Norfolk Southern R. R. Co. and presumably had been used in all of the final settlements theretofore made (R. 114, 115, 117). The Government's position is that these settlements, even though figured by the precise computation method, are beyond attack and that they cannot be refigured or refunds claimed under the general average method, because they were made as final settlements under Section 209(g); but that partial payments computed in the same method under Section 212 can be recomputed under the general average method and refunds claimed, even though the result figured by "judg-

ment" factors and general averages is four million dollars less than when figured by precise increases and five million dollars less than the carrier's actual expenditures.

If the Great Northern had accepted final settlement in place of its partial settlement, the payment would undoubtedly have been figured on the basis of precise increases and would have produced a certificate and payment at least approximating $15,705,688 then computed to be due. We would then have been permitted to retain without question not only the $1,329,785.89 for which this suit is brought, but the additional three million dollars which the Government was then willing to pay; as we would then be in the same position as the other carriers with whom final settlement was made during the year 1921. It is only because our payment was labeled "Section 212" instead of "Section 209(g)" that the Commission claims the right to recompute it by the method of general territorial average, and not only to withhold the additional three million dollars to which we were then found to be entitled but to recover $1,329,785.89 of what was actually paid to us.

Thoroughness of the Commission's Original Computation.

Under the Federal Control Contract, the Director General of Railroads was obliged to make similar computations of allowable maintenance expenses. He had commenced the study of this subject three years before the date of our partial certificate and had prepared elaborate forms (R. 62). The Commission's Bureau of Finance started functioning in respect to claims for guaranties directly after March 1, 1920, or one year before our partial certificate was made (R. 60, 61). It had about 100 employes of whom about 40 were working on guaranty matters (R. 55). During this year, it had before it the formulae which had been adopted by the Director General and

had had conferences with the Director General on the subject. It "took advantage of and had the benefit of what the Director General had done" (R. 63). In addition to this, a standing committee of the carriers, called the Railway Executives Committee and various sub-committees of that organization had promulgated a very elaborate formula which was submitted to the Commission about May or June, 1920. The Great Northern claim was based largely on this formula (R. 63). "In addition, the Commission had called upon the carriers for suggestions and ideas as to methods which should be followed in determining the guaranty and had met with the adjustment committee and other carriers' representatives in oral conferences practically throughout the Guaranty Period, discussing methods and principles to be followed" (R. 63). All this occurred during the year preceding our original partial certificate. This is the testimony of the Government witness.

The Commission had issued three general orders during the preceding year, giving instructions as to methods of calculating the guaranty (R. 143, 174, 176). The last one, that of October 18, 1920, prescribed elaborate forms and contained an extensive questionnaire occupying 34 printed pages of the record in this case (R. 143, 177). Respondent's return to this questionnaire was an elaborate document containing 119 pages of data (R. 57, 58). When it was filed, the record states that, "There were several representatives of the Bureau, both of the accounting and engineering sections, engaged in conferences with different representatives of the defendant during the working or week-days between February 14th and 23rd, approximately 8 or 9 days" (R. 60). At the conclusion of these conferences, they submitted a report of their work to the Commission covering 4 printed pages of the record, itemizing the deductions and corrections which had been made and explaining the reasons

therefor (R. 210-214, 214-217). The computations were in odd dollars and cents and not in round numbers. If an equal amount of time were given to each of the 200 odd other carriers in the United States, it would have taken four or five years to settle all the guaranties.

Our witness, Mr. Turnburke, described the process of determination used by the Commission in much more detail, stating that he had working papers from which it could be mathematically determined just what they did (R. 97). The representatives of the Commission checked our return thoroughly, eliminated items which were doubtful, called for additional information on other items, adopted different methods for determining certain items, and "made a thorough mathematical check of the figures in these returns to satisfy themselves that there were no mathematical errors" (R. 98). For this purpose, representatives of the Commission paired with representatives of the carrier, each pair working upon different items, and this process continued all day every day from February 14th to February 23rd (R. 59).

No methods of computation which the Commission then considered questionable or unsettled were allowed to stand and all items as to which any doubt existed were eliminated. "Wherever defendant had followed a method or principle which the Commission considered questionable, it made a deduction to cover it" (R. 69). For instance, our return included a claim for so-called ineffectiveness of labor and also a claim for increase of test period depreciation charges to reflect increases in values. At this time the Commission had not definitely decided whether such claims would be allowed or not, and accordingly they were rejected in making the partial certificate, not because the Commission had then finally determined that they were not allowable, but merely because they were questioned and had not been decided (R. 67).

The methods followed and the thoroughness of the work were the same in all respects as in the case of the *final* settlement with the Norfolk Southern which had been concluded a month previously (R. 72, 114-115, 117). We invite detailed comparison of the method of examination in the Great Northern case (R. 96-106, inc. and 108) with the examination for the purpose of final settlement with the Norfolk Southern (R. 114-116).

That the Commission had all the necessary data and was in a position to make a definite ascertainment is indicated by the fact that at about the time our partial certificate was issued, our General Auditor, in conversation with Col. W. A. Colston, the Director of the Commission's Bureau of Finance and G. I. Bunting, Assistant Director in Charge of the Section of Accounts and Statistics, was told that the Commission was ready to issue a final certificate under Section 209(g) if defendant desired it, but that it would take about ten days (R. 108). However, the defendant preferred to defer the final certificate in the hope that items which the Commission was then questioning and therefore rejecting might later be allowed, which would result in a payment even larger than the $15,705,688, which had then been computed. In order to avoid having to waive such items, defendant accepted a partial certificate instead. This decision cost us over $3,000,000.

That the Commission was not only in a position to make definite ascertainments at the time of our examination but that it actually contemplated doing so is further indicated by a letter of January 22, 1921, from Chairman Clark of the Commission (Congressional Record, 66th Congress, 3rd Session, pages 108, 109), in which he said, "It will be noted that such certificates are by the terms of this paragraph to be 'for any amount definitely ascertained by it (the Commission) to be due'. I think there is no misunderstanding in the language. There

is no room for misunderstanding of our conception of our duties under it, which is that a partial payment certificate would not be made for any amount in excess of an amount 'definitely ascertained' by us to be due the carrier". This was followed on March 2, 1921, by written instructions of the Bureau, to the effect that "partial payments are not based upon estimates as were advances under Section 209(h), but represent definite ascertainments" (R. 218). And that was followed in turn by a statement by the Commission itself in 70 I. C. C. 711, decided December 15, 1921, in which the Commission said on page 714, "We are required to make a definite ascertainment for partial payment purposes as clearly as we are required to make definite ascertainments in final settlements".

SUMMARY OF ARGUMENT.

I. Part I of Petitioner's brief is inapplicable. In the decisions cited, proof had been offered in court showing mistake or error in the original determination. No such proof was offered in the present case. The cases do not sustain the proposition that an "overpayment" by an administrative tribunal is established by a mere later recomputation of a smaller amount by the same tribunal without proof of mistake in the prior computation.

II. Section 212 provides for a definite ascertainment and for a payment as distinguished from an advance. It provides specifically that as to certain items the determination shall have only *prima facie* effect, thereby implying that it should be conclusive as to all others. An attempt to amend this section by providing for refund in the event of a final determination for a smaller amount was voted down. In the debates, it was fully explained by members in charge of the bill that

the payment was to be a binding one and not subject to refund or recovery. The Chairman of the Commission had advised the Congressional Committee prior to the passage of the bill that such would be the Commission's understanding.

III. There was no mistake nor error and the requirements of the statute were fully complied with. The Commission declared in the partial certificate itself as well as in other documents that it intended a definite ascertainment and not a mere estimate. The Commission was already prepared to make *final settlements* with carriers and had actually done so. It had had an elaborate organization employed in the study of the subject for a year and made a thorough study and detailed computation of our allowance. No items were allowed and no methods were followed which were not definitely adopted and in use at that time or which were then in question or undetermined.

ARGUMENT.

I. *"Overpayment" by an administrative tribunal is not established by a mere later recomputation of a smaller amount by the same tribunal, and refund cannot be recovered without proof of mistake or fraud, except in cases where the statute makes the final determination controlling.*

In part one of its brief, the Government cites the following cases which are alleged to support the proposition that "overpayment" by an administrative tribunal is established by a mere later recomputation of a smaller amount by the same tribunal and that refund of such overpayment can be recovered without other proof of fraud or error.

Wisconsin Central R. R. Co. v. United States, 164 U. S. 190.

Grand Trunk Western Ry. Co. v. United States, 252 U. S. 112.

United States v. Burchard, 125 U. S. 176.

Burnet v. Porter, 283 U. S. 230,

and other cases cited in the foot-note.

None of these cases support the rule contended for because in each of them the original payment was made under an actual mistake, either of fact or law, and the court was able to satisfy its own mind that such a mistake had been made. Where the mind of the court is not satisfied that mistake or fraud existed in the original payment, the mere fact that a recomputation of a smaller amount has subsequently been made by the same tribunal does not in itself prove an "overpayment", nor establish a cause of action for recovery of the difference.

Kendall v. United States, 12 Pet. 524.

United States v. Mason, 33 Dist. Ct. App. 350.

Noble v. Union River Logging R. Co., 147 U. S. 165.
Dougan v. United States, 34 Ct. Cl. 458.
1st Natl. Bank v. United States, 15 Ct. Cl. 225.
United States v. Kaufman, 96 U. S. 567.
United States v. City of Louisville, 169 U. S. 249.

In line with these decisions, the Government concedes on page 18 of its brief that the Commission could not make subsequent corrections of a *final* certificate made under Section 209(g) and thereby establish an "overpayment" and a right of recovery. To sustain recovery in such a case it would clearly be necessary to satisfy the mind of the court that the amount paid in final settlement had resulted from actual fraud or mistake.

It is true that in this case the subsequent computation was one that was expressly authorized by Section 209(g). This raises a question different from those in the cases above cited and one that will be discussed in the next section of this brief. We desire to point out here, merely that the decisions cited in part one of the Government's brief are not in point because the recovery in those cases was based upon proof of actual fraud or mistake and not upon a mere subsequent recomputation by the administrative tribunal.

It is, of course, entirely competent for a legislative body to authorize two computations and to make the first one subject to the second, so that a mere recomputation by the administrative tribunal would in itself establish a cause of action. Congress did this very thing in paragraphs 209(h) and 209(g). Section 209(h) authorized a preliminary computation and a payment or advance of the amount computed, but specifically provided that it should be subject to a subsequent computation under Section 209(g) and to refund of any excess.

But Section 212 provided for a very different kind of a prior computation. It was to be a "definite ascertainment" and the amount computed was to be a "payment" and not an advance. It is true that authority for a subsequent determination under Section 209(g) still remained, but there was no provision giving it precedence over the prior determination. And the evidence is overwhelming, both in the wording of the statute and in its legislative history, that a subsequent computation for a smaller amount was not to be proof of an "overpayment", or to establish a right to a refund without proof of actual fraud or mistake. This is the question presented by the present case and which we will now discuss. The decisions cited in part one of petitioner's brief have no bearing upon this question and throw no light upon the matter.

On page 16 of the Government's brief it is alleged that there is a "perfect analogy" between the cases cited and the present case because "in each situation there is an administrative determination followed by a payment of public money, and thereafter another administrative determination that the payment made was excessive". But in the cases cited there was a third step, i. e., the satisfying of the mind of the court that the first payment was made under error. In the present case this third step is not taken. Here the second administrative finding is relied upon as establishing a cause of action *per se*. There is no support for this in any of the decisions cited.

II. *Final certificates under Section 209(g) do not take precedence over partial certificates under Section 212. Payments under partial certificates become vested in the payee subject to recovery only upon proof of mistake or fraud.*

The original complaint was drawn solely upon the theory that the mere making of the final certificate for a smaller sum

was sufficient to prove overpayment (R. 1-5). Our demurrer to this complaint was sustained on the ground that the final certificate was not in itself sufficient to prove overpayment (R. 7-14). The plaintiff thereupon filed its amended complaint, adding paragraph 12 alleging mistake in the making of the partial certificate (R. 18).

Since plaintiff failed to allow judgment to be entered upon the order sustaining our demurrer, and to appeal therefrom, the ruling of the lower court becomes the law of the case, and the plaintiff is foreclosed from renewing that issue in this court.

Poling v. Jeffords, 56 App. D. C. 88, 10 Fed. (2d) 653.
U. S. v. Boyd, 5 How. 29.
Clearwater v. Meredith, 1 Wall. 25.

Even if this question were still open, however, we submit that the decision of the lower court is sound.

If there were nothing in this case except an authority in the Commission to make a prior award and then a further authority to make a recomputation and a final award, it might be argued that the Commission in Guaranty Period matters was a continuing tribunal authorized to deal with the subject in the light of all its accumulated experience and not precluded from revising its opinion in any case while the case was still before it for further consideration. Such was the procedure under Section 209(h). But we shall point out that Section 212 provided for a radically different procedure.

It must be conceded that Congress had the *power* to provide for prompt partial payments, even though not complete or final, but which should nevertheless be binding *pro tanto*. It had the power to declare that the aggregate of payments so received might be retained by the carrier in satisfaction of the

guaranty, even though the complete and final determination might be for a smaller sum.

That it intended to do this, and that the partial certificates were intended to be binding *pro tanto* is indicated by the following considerations:

(1) The *wording* is similar to that of Section 209(g), which authorizes the final settlement, and which the Government concedes would be binding. Section 209(g) says, "The Commission shall * * * *ascertain* and certify * * * the several amounts necessary to make good the foregoing guaranty * * * ". Section 212 says, "The Commission, if not at the time able to determine the whole amount due * * *, may make its certificate for any amount definitely *ascertained* by it to be due * * *". Both sections use the word "ascertain", but Section 212 adds the word "definitely", so that the wording of Section 212 is even stronger than the wording of Section 209(g), which admittedly provides for a determination that shall be binding.

(2) Section 212 contains two paragraphs. Paragraph (b) covers "deferred debits and credits" such as unsettled damage claims, while paragraph (a) covers all other items. Paragraph (b) permits a reasonable estimate of deferred debits and credits to be used as a definitely ascertained amount, but provides that such estimates "shall be *prima facie* but not conclusive evidence of their correctness in amount in final settlement". There is no such provision as to items other than deferred debits and credits, and which are covered by paragraph (a). If all items certified under Section 212 were to be merely *prima facie* but not conclusively correct, as claimed by the Government, why enact a special provision to that effect as to one class of items only? In this sentence, Congress had apt lan-

guage for the purpose of making the entire certificate *prima facie* but not conclusive, and it rejected that language except as to deferred debit and credit items. *Expressio unius exclusio alterius.*

This reasoning is strengthened by the legislative history of paragraph (b). As this paragraph was introduced, it provided that the Commission's "reasonable estimate" of the net effect of deferred debit and credit items, when agreed to by the carrier could be used as a definitely ascertained amount, and that such estimate so agreed to "shall be binding in final settlement". Mr. Dewalt offered an amendment striking out the word "binding" in the last line and inserting the words "*prima facie* but not conclusive evidence of their correctness in amount". This amendment was debated on pages 2815 and 2816 of Congressional Record, Volume 60, Part 3, and was adopted by a vote of 116 ayes, and 95 noes. Thus Congress drew a distinction between deferred debit and credit items mentioned in paragraph (b) which in the nature of things could not be definitely ascertained, and all other items, covered by paragraph (a), which could be definitely ascertained. The deferred debits and credits were made "*prima facie* but not conclusive" while the definite ascertainment of all other items, under paragraph (a), was left conclusive and binding.

This becomes all the more significant when we find on page 2812 of the Congressional Record (Vol. 60, Part 3) a similar attempted amendment of paragraph (a) which was voted down. In other words, as originally introduced, both paragraphs were to be binding. Separate amendments were proposed as to each paragraph, the effect of which would be to make the certificate subject to correction and refund. The amendment was voted down in the case of paragraph (a) and adopted in the case of paragraph (b). Refund was specifically denied under paragraph (a).

3. Congress also rejected the language of Section 212(h) which would have aptly provided for the refund now claimed. Under the Government's contention, a payment under Section 212 would assume exactly the same status in law as the advances which had been provided for under Section 209(h), except that no security for their refund would be required. Under Section 209(h), the Commission had been authorized to make advances on account of the guaranty during Federal Control upon mere estimates and without any "definite ascertainment", and upon an express promise by the carrier, secured by bond, to refund any excess over the amount of the final certificate. The Government contends that Section 212 was intended to establish exactly the same obligation except for the security, and that the only reasons why a new statute was required were, first to dispense with the security, and second, because the advances provided for in Section 209(h) were limited to the terms of the Guaranty Period and could no longer be made on March 1, 1921, when Section 212 was passed. If this had been the intent of Congress, the simple obvious way to accomplish it would have been to enact that advances under 209(h) might still be made and that security need not be taken. Merely striking the words "during the Guaranty Period" and the words "secured in such manner as the Secretary may determine" out of Section 209(h) would have accomplished this object.

But it is suggested that since the security was to be dispensed with, it was necessary to require a more careful estimate, and that for this reason, Congress may have wished to pass a different statute in order to provide for a "definite ascertainment" instead of an estimate. This object, however, could easily have been secured by striking the phrases just quoted from Section 209(h), and by substituting the words "as the Commission may definitely ascertain are not in excess of the amount

necessary", etc., for the words "not in excess of the estimated amount necessary", etc.

Congress would then have had a paragraph specifically calling for refund in case of excess, and specifically accomplishing the very object which the Government asserts was its intention. The fact that it had before it in Section 209(h), apt language calling for repayment, and that it rejected such language, and provided for a definite ascertainment and partial payment without provision for refund shows conclusively that the intention was that there should be no refund.

It appears from the debates in Congress, quoted below, that there was good reason for eliminating the idea of a mere advance subject to refund. To have provided for mere advances under Section 209(h), would have placed cash in the hands of the railways, but would have left them uncertain as to how freely they could use it, or whether they might not have to refund it. To avoid this, Congress enacted Section 212, providing for definite payments.

4. If the wording of the statute itself leaves any possible doubt as to its intent, this must be set at rest by the legislative history of Section 212. That it is proper to consider these appears from the following decision:

> "Where doubts exist and construction is permissible, reports of the committees of Congress and statements by those in charge of the measure and other like extraneous matter may be taken into consideration to aid in the ascertainment of the true legislative intent. * * * But the reasons for and the significant circumstances leading up to the enactment may be noticed in confirmation of the meaning conveyed by the words used."
>
> *United States v. Missouri Pacific R. Co.*, 278 U. S. 269 at 278.

During the debates on Section 212, those opposing the measure repeatedly objected to the bill on the ground that certificates issued under its provisions would be conclusive, and the majority members of the Committee who were in charge of the bill replied that this was exactly the result intended; that they proposed to make the partial payment as binding for the amount involved as the final payment would be. We will quote here some short examples of this, the emphasis being supplied by us.

In Volume 60, Part 3 of the Congressional Record, on page 2739, Mr. Sims, a minority member said:

> "This bill provides no protection to the Government in case of excess payments on certificates. It provides that the Interstate Commerce Commission's certificates must be paid in full and no return whatever to the Government is provided for such excessive payment."

On page 2813, Mr. Barkley, a minority member of the Committee, said:

> "But suppose it turns out afterwards that there is a mistake, and suppose that the railroad has put something over the Interstate Commerce Commission in arriving at the estimate. Then, under the language of this bill, that estimate which has been arrived at must be *final settlement as to that item,* and the Government has no recourse to offset that claim against another claim that may be adjusted in the future."

A little further down, Mr. Barkley says:

> "But if you leave the language like it is, you have this situation: every road will insist upon settling each one of these items at a time, and when one of them has been settled, the Government is bound by that settlement."

The foregoing quotations are from remarks by members of the opposition who pointed out very clearly that certificates

issued under the proposed bill would be binding upon the Government. That this was fully understood by the majority members in charge of the bill and that it was the exact result intended to be accomplished appears from the following quotations:

Mr. Denison, page 2813, said:

"The Interstate Commerce Commission is the tribunal which we have entrusted with the authority to make these final settlements, and if we can depend upon them to protect the interests of the Treasury in making final settlements, it seems to me we can very well do so in making partial settlements.

Mr. Barkley: But the Interstate Commerce Commission is liable to make mistakes as well as anybody else, and these accounts will be audited by individuals in the Interstate Commerce Commission. Does the gentleman think that the Government should be protected if it should occur that a mistake was made?

Mr. Denison: We have got to reach settlements some time. I was informed this morning that the accounting department of the Interstate Commerce Commission is the finest accounting institution of its kind in the United States if not in the world, and if we cannot depend upon it to safeguard the interests of the Treasury in making these settlements, then we ought to endeavor to provide some tribunal upon whom we can depend."

The following appears on page 2803:

"Mr. Hardy (of Texas): Does not subsection (b) foreclose the Government in any error forever thereafter?

Mr. Barkley: That is my understanding."

Mr. Dempsey said, page 2809:

"Now, the gentleman from Tennessee (Mr. Sims) makes two objections. First he assumes that the Interstate Commerce Commission is to make some fatal error and he

wants to defer that judgment. Is the question to be referred to some other body? Is it to be referred to the Supreme Court? Why, if it is to be determined anyway in the end by the Interstate Commerce Commission—you have the same Commission, you have the same facts, and is the gentleman assuming that *on the same state of facts, the same body will give an erroneous judgment at one time and a correct judgment at another* * * *."

The following appears on page 2809:

"Mr. Reavis: * * * If we pay more under the estimate than we owe and have agreed to what has the Interstate Commerce Commission to do with it?

Mr. Dempsey: Why, the Interstate Commerce Commission issues a certificate upon the facts, and its decision is made upon all of the data obtainable.

Mr. Reavis: But if we pay more than is due?

Mr. Dempsey: *We are just as likely to be right now as at any time in the future.*"

Mr. Winslow said, page 2812:

"Under the provisions of the Transportation Act, the amount arrived at and which could be put forward as an advance was the *estimated* amount, and for that reason of estimate, in order to protect the Government, the conditions of the bond or security to cover are provided in the law.

Now, in this instance, we have *another situation.* Whatever amounts will be paid under the Bill before us will represent agreed upon amounts which have been carefully canvassed, and which have been worked out to the satisfaction both of the debtor and creditor. That is a very different situation indeed."

On page 2802 occurs the following:

"Mr. Montague: As I understand it, there is no bond required *if there were only one final payment.*

Mr. Merrit: None.

Mr. Montague: And you simply ask that the *same rule apply here?*

Mr. Merrit: Certainly."

If it be asserted that these were expressions by individual members of Congress only, even though majority members of the Committee in charge of the bill, and that they do not necessarily reflect the opinion of Congress as a whole, we point to the amendment proposed by Mr. Barkley. On page 2812 appears the following:

> "Mr. Barkley: Mr. Chairman, I offer an amendment. * * * At the end of line one, page 2, insert: 'Before making such payment or drawing such warrant, unless it be upon a final settlement, the Secretary of the Treasury shall require the carrier to execute a contract on such security as the Secretary of the Treasury may determine, that upon final determination of the amount of the guaranty under Sections 204 and 209, such carrier will repay to the United States any amounts which it has received from such partial payment in excess of the guaranty with interest at the rate of 6% per annum from the time such excess was paid."

On page 2815, the following action on this amendment appears:

> "The question was taken; and on a division (demanded by Mr. Barkley) there were—ayes 65, noes 115."

It thus appears that Congress not only rejected the apt language in Section 209(h) providing for a refund of excess payments, and rejected in paragraph (a) the apt language which it inserted by amendment in paragraph (b), providing that the certificates should be *prima facie* but not conclusive evidence of their correctness as to deferred items only, but it deliberately and specifically rejected a proposed amendment to Section 212(a), which would have made any excess in the par-

tial payment certificate, over the amount of the final certificate, recoverable.

The intent could be no clearer if Congress had expressly added a clause in Section 212(a) reading, "and no excess in such partial payment over the amount of the final certificate shall be recoverable".

On page 22 of its brief, the Government points out that the Barkley amendment providing for refund and security for the same was opposed on two grounds: first that it would be binding in effect, and second that many short lines could not furnish the security which it required. This court is asked to attribute the rejection of the amendment to the latter ground rather than to the former. However, if this had been the intention of Congress, it would have been necessary only to expunge the words "on such security as the Secretary of the Treasury may determine" from the Barkley amendment, thus leaving the provision for refund in effect. It would be strained indeed to hold that Congress rejected the entire amendment, including the provision for refund merely to get rid of the provision for security.

There also appears in the Congressional Record, 66th Congress, 3rd Session, pages 108 and 109, a letter from Chairman Clark of the Interstate Commerce Commission to Chairman Esch of the Committee on Interstate and Foreign Commerce of the House of Representatives, dated January 22, 1921, while Section 212 was pending, clearly advising the Congress that the Interstate Commerce Commission would understand the bill as authorizing it to make definite ascertainments and definite payments. Chairman Clark said:

> "Paragraph (a) of Section 212 very definitely authorizes certificates in partial payment and payment of such certificates. It will be noted that such certificates are by the terms of this paragraph to be 'for any amount defin-

itely ascertained by it (the Commission) to be due'. I think there is no misunderstanding of our conception of our duties under it, which is that a partial payment certificate would not be made for any amount in excess of an amount 'definitely ascertained' by us to be due the carrier."

5. In the court below, the Government itself was so thoroughly convinced of the soundness of our argument and so hopeless of establishing the position for which it is contending here that it withdrew this contention. In the "Reply Brief for the United States" filed in the Circuit Court of Appeals, the Government conceded on page 3 that "apparently Congress intended the Government to be bound by advances under Section 212, assuming, of course, that the Commission had in truth and in fact made a definite ascertainment required as a prerequisite to such payment." This was also conceded upon oral argument in the court below. We submit that it is unfair to the Circuit Court of Appeals as well as to this Court, to submit a question here which was waived in the court below and to ask for a reversal of the lower court's decision upon a question which was conceded in that court.

The Government's Reply.

In spite of the clear wording of Section 212(a), calling for a binding determination, the corroboration in Section 212(b) providing an exception in the case of deferred debits and credits and the clearly expressed intent of Congress not only in the Congressional debates but in its action upon the proposed amendments, all of which compelled the Government to concede our position in the court below, the Government in part two of its brief now advances various arguments opposing this

construction of the statute, and we desire to notice these arguments briefly.

On page 18, the Government advances an alternative construction by suggesting that even though Congress intended the partial certificates to be something more than mere estimates, it does not follow that it intended to deny the United States the right of recovery in the event that a final certificate should be made for a smaller sum. We believe that there is no room for an alternative of intermediate construction. Any excess over the amount of the final certificate either was or was not to be refunded. If it was to be refunded, the payment was a mere advance on account and no amount of reasoning can give it any other legal status. There is a direct inconsistency and contradiction in asserting that it was something more than an advance on account but that it was still subject to refund and recovery.

On page 18 of its brief, the Government argues that in authorizing "partial payment", Congress necessarily implied that any excess should be refunded, since any payment in excess of the total obligation cannot be a "partial" payment. What Section 212(a) authorizes is not a "partial payment" but the payment of "any amount definitely ascertained by it to be due". If the amount were to be subject to refund, the proper term to use would be the word "advance" which was used in Section 209(h), or the word "loan" and not "payment", whether partial or otherwise. The word "payment" imports finality. This argument of the Government would deny the power of congress to make a payment on account binding.

Petitioner points to the fact that Section 212, after authorizing a partial certificate, proceeds to authorize further certificates, thereby implying that the first certificate is not a final one. Similarly, it is pointed out on page 23 that Section

212(b) specifically provides for further consideration in the making of the final certificate, thus recognizing that the partial certificate was not a final one. And again it is contended that since Section 209(g) itself provides for a final determination, there would be inconsistency in attributing finality to the partial certificate. But clearly Congress had the constitutional *power* to declare that a payment, then regarded as only partial, should nevertheless become vested in the payee without liability for refund, no matter what the final conclusion might be. Notwithstanding the fact that the payment, then regarded as only partial, was to be conclusively vested in the payee, it would still be necessary to provide for further partial certificates, and also for completing the final determination, in order to determine whether any additional amounts were due. Whether the partial certificate were conclusively or only *prima facie* correct, there must still be provision for further partial certificates and for a final determination. The fact that such further steps are provided for, therefore, throws no light whatever upon the question whether the partial certificate was intended to have conclusive or only *prima facie* weight.

On pages 18 to 20, petitioner advances the argument that the word "ascertainment" as used in Section 212 should be given a different meaning and effect from the same word as used in Section 209(g) because of the different objects to be accomplished by the two sections, the primary purpose in Section 209(g) being finality and the fixing of property rights of the carriers, while the primary purpose of Section 212 was promptness in payment. This argument might well have been presented to Congress as a reason for making mere advances on account, instead of binding payments, under Section 212. But after Congress has plainly taken the opposite position, the argument can have no weight with a court. It is clear from

the wording of Section 212 as well as from the Congressional Record that Congress intended to vest property rights and to provide for finality in the certificates under Section 212 as much as in the certificates under Section 209(g). This was the whole burden of the argument of those in charge of the measure. In the financial emergency which existed, it was the desire not only to secure promptness of payment but to give the payee the assurance that it could spend the money as its own and that it need not keep it in reserve to provide for possible refunds. Half of the object of the payment would have been defeated by such a requirement. There is no basis for petitioner's contention that *promptness* was the *only* object and that that object would be sufficiently accomplished by a mere *advance* of money even though the carrier might be afraid to spend it for fear of being called upon for refund.

On pages 19 and 20, petitioner argues that the construction adopted by the courts below is inconsistent with the purpose of promptness "since of necessity all payments would have been withheld until the ultimate right to retain them had been finally determined.

This last statement ignores the fact that Congress had been specifically advised that the Commission was already prepared to make definite ascertainments, and that these would not involve delay. On page 2738 of the Congressional Record, Mr. Cooper had quoted the preceding annual report of the Commission, referring to "the immediate payment to some of these carriers of the amounts or parts of amounts *which we can now determine to be certainly due them*, under the Guaranty provisions of the Transportation Act, 1920". (Italics ours.) And Chairman Clark of the Interstate Commerce Commission had advised the Congressional Committee in the letter above quoted, that "a partial payment certificate would not be made

for any amount in excess of an amount 'definitely ascertained' by us to be due the carrier".

When Section 212 was enacted, the Commission had been studying the formulae and methods of determining payment for a year and had had as many as 40 men employed in this work (R. 55, 62). It had had the advantage of two or three years' previous experience of the Director General in determining the same questions (R. 63). On October 18, 1920, more than 4 months before Section 212 was passed, the Commission had issued its very elaborate order and questionnaire calling upon the carriers for the information necessary to conclude *final* settlements (R. 143). On January 29, 1921, more than a month before Section 212 was enacted, it had actually concluded a final settlement under Section 209(g) with the Norfolk Southern Railway, which is conceded to have been a definite and final ascertainment (65 I. C. C. 798, R. 114-116).

In *Continental Tie and Lumber Company v. United States*, No. 560, decided May 16, 1932, and not yet reported, this Court said:

> "But it is not clear that if the taxpayer had acted promptly an award could not have been made during 1920, or at least the principles upon which the Commission would adjust the railway's accounts to reflect true income have been settled during that year sufficiently to enable the railway to ascertain with reasonable accuracy the amount of the probable award. The reports of the Interstate Commerce Commission show that it was possible for a carrier whose claim arose under Section 209 to obtain a final award early in 1921, prior to the time for preparing its income tax return. (Note No. 3.)

We submit that there is no foundation in the record for petitioner's argument that a requirement of conclusiveness in the

partial certificates would have prevented prompt action. All of the information before Congress was to the contrary.

Finally petitioner submits an elaborate argument apparently taking the novel position that the construction of the statute should be governed by the intent and understanding of the Commission and the carrier at the time, rather than by the intent of Congress and the plain wording of the statute. On page 20, it is pointed out that by making similar overpayments to other carriers, the Commission showed "a contemporaneous construction" of the Act. On page 21, it is said that the respondent, in asking for a certificate under Section 212 in lieu of the credit certificate previously issued, indicated an understanding that it would be subject to revision and correction, and that neither party regarded the certificate under Section 212 as binding.

It seems scarcely necessary to argue that neither a tribunal acting under statute, nor an individual with whom it deals, nor both, can change the effect of a statute or govern its result by their intent or understanding. However, we desire to point out that the Commission did not deliberately include any overpayment either in our case or in that of other carriers. On the contrary, after carefully computing the amount due us, it arbitrarily deducted more than three million dollars in order to be sure that there would be no overpayment. There is no indication here that it contemplated the possibility of a refund. Moreover, if an overpayment was made in our partial certificate under Section 212, similar overpayments were made in many of the earlier *final* settlements which were computed by the same methods. If Section 212 is to be construed as permitting refunds, simply because the Commission was then using more liberal methods of computation, then Section 209(g) must be construed as requiring refunds, upon the same ground.

Moreover, the assumption that neither party regarded the payment as binding is directly contradicted by the debates in Congress, by the letter from Chairman Clark to the Congressional Committee, by the memorandum of instructions issued by the Bureau (Exhibit D) and by the wording of the certificate itself, all of which make it perfectly clear that at that time all concerned except perhaps the Government's witness who testified in this case, understood fully that a definite ascertainment and a binding payment were being made.

On page 23, petitioner asks the court to annul the statute on the ground that the Government would be bound but the carriers would not. This is another argument that should have been presented to Congress. The situation presents the ordinary case of a partial accord, the result of which is that the creditor cannot be compelled to accept any less but the debtor may have to pay more. There is nothing unusual about this situation.

On pages 23 and 24 of the Government's brief, it is argued that while the guaranty is not a gift or a subsidy, it is nevertheless made without direct consideration and must be construed in favor of the Government. The Government had contended in the court below that the guaranty was a gratuity. We deny both that it was a gratuity and that it was made without consideration.

If we grant that this statute was a gratuity and must receive the strictest possible construction, we submit that we have given it such a construction. If we had nothing to go on but the plain meaning of the words "definitely ascertained" in Section 212(a) that should be sufficient. And when that plain meaning is confirmed by contrast with the "*prima facie* but not conclusive" language in Section 212(b), with the provisions for estimates, advances and repayment in Section 209(h), with the

Barkley amendment which was rejected, and with the debates in Congress, we submit that the strictest tests of construction which human ingenuity can suggest are fully complied with.

Moreover, it is not true that the guaranty was made without consideration, in the sense contended for by the Government. Section 209(d) provides that if the carrier's income for the guaranty period as a whole is in excess of the guaranty, the carrier must pay the amount of such excess into the Treasury of the United States. The obligations were reciprocal. The Government was to pay the carrier for any deficit and the carrier was to pay the Government for any excess. And the records show that some of the carriers actually had such excess and actually paid the amount to the Treasury.

And even if we ignore this reciprocal obligation, which was assumed by the defendant, and view the guaranty as though it were entirely one-sided, the debates in Congress and the statements of those in charge of the measure show that the guaranty was not enacted as a gratuitous favor or privilege to railroad stockholders, but in discharge of a public duty and obligation. Such debates appear in the Congressional Record containing the debate in the House of Representatives on Section 209 of the Transportation Act of 1920, in Volume 58, pages 8329, 8331, 8338, 8383, and Volume 59, pages 3330 and 3343. They show that the Government had taken railroads, which at the beginning of Federal Control were prosperous and self-supporting, and had so managed them that at the end of Federal Control, when they were to be returned to their owners, they were not taking in enough money to pay for their operation, and that they would have been forced into immediate insolvency and receivership. This was due not only to the inevitable increase in material costs but to the wage increases which had been instituted under the Adamson Law and by the Director General,

without making corresponding increases in freight and passenger rates. Cars and engines had been taken from the roads where they belonged and scattered about the country. The personnel and official organization of the carriers had been disrupted. Traffic movements which individual carriers had obtained for their lines through years of solicitation had been diverted to other lines. There were ample grounds for enormous claims for legal damages against the Government.

Moreover, the carriers were clearly entitled to substantial and immediate rate increases in order that rates might pay expenses and some return on investment. Statements from the Commission show that it would take at least six months to put such increases into effect. The public undertook to meet its obligation to the carriers through these fixed payments in lieu of meeting them through immediate rate increases.

Another consideration was that a financial catastrophe was feared with consequent unemployment and public suffering and that Government relief was felt to be necessary. The Railroads were to be used as a conduit for this government relief, accepting the money from the Government and expending it in the employment of labor. It would have been highly inequitable to have caused the carriers to receive these payments and to disburse them in the accomplishment of this public object and then to require a refund, thus requiring the railroad stockholders to bear the burden of public relief which the Government itself undertook to bear. We believe that all of these reasons for the passage of the bill are supported by statements in Congress by Committee members in charge of the bill which appear upon the pages cited, and that there was ample and real consideration for the guaranty.

The Decision in the Northern Pacific Case.

The seemingly contrary decision of the Court of Appeals of the District of Columbia in *Northern Pacific Railway Company v. Interstate Commerce Commission*, 23 F. (2nd) 221, was made upon a different state of facts and without knowledge of the legislative history of the Act and the statement regarding the construction of the statute was not necessary to the decision. In that case the carrier filed in the Supreme Court of the District of Columbia, a petition for a common law writ of certiorari to review and set aside the Commission's *final* certificate issued under Section 209(g). It appears from pages 13 to 30 of the brief for the Interstate Commerce Commission which was filed in this Court in opposition to a writ of certiorari, that the main contention of the Government in that case was that the carrier had pursued the wrong remedy in seeking to review the Commission's certificate by common law writ of certiorari from the Supreme Court of the District. Moreover, the effect of a partial certificate was not involved in that case. The proceeding was one to cancel a *final* certificate as invalid. Even though the previous partial certificate issued to that carrier under Section 212 were binding and conclusive, this would not necessarily invalidate the subsequent final certificate under Section 209(g) or warrant the court in setting it aside on writ of certiorari. We submit that the district court in that case should simply have dismissed the application for a writ because of lack of jurisdiction, without attempting to pass upon the conclusiveness of the previous partial certificate.

Moreover, that case presented facts different from those in the present case. On page 224, the court points out that the Northern Pacific in applying for its partial payment had agreed to refund any excess which might later be determined. There was no such agreement in our case.

But the most significant difference is that the debates in Congress upon Section 212 and the extracts from the Congressional Record which we have quoted above were not called to the attention of the District Court of Appeals. A decision by the District Court of Appeals made without knowledge of the legislative history of the Act cannot be regarded as evidence that the conflict is a serious one or that the question is really debatable.

We might add that there is an obvious fallacy and inconsistency in the reasoning of the court in the *Northern Pacific case*. It argues that Section 212 could not have contemplated a "definite ascertainment" because that would have necessarily involved delay and Congress desired prompt action; but at the same time the court says that Congress desired something more than the mere "estimate" provided for in Section 209(h) because the carrier's bond or security was to be dispensed with. In other words, promptness was to be accomplished by *avoiding* a thorough investigation and security was to be accomplished by *requiring* one. We submit that if Congress desired certainty in order to justify the waiving of security, then it might as well make the payment conclusive, as we contend that it did, for the delay would be incurred in any event. Moreover, the court was under a misapprehension in assuming that a definite ascertainment would have involved delay. As we have pointed out above, the Congressional Record shows that while Congress was considering the bill, it had been advised that the Commission was already prepared to make definite ascertainments without any substantial delay.

The District Court of Minnesota and the Circuit Court of Appeals of the Eighth Circuit are the only courts which have passed upon this question with full consideration and full knowledge of the legislative history, and with full knowledge

of the facts disclosed by the Congressional Record. We submit that the decision of the Court of Appeals of the District in the *Northern Pacific case,* involving different facts, and being in the nature of a *dictum,* and made without knowledge of the facts disclosed by the Congressional Record, is not really in conflict with the decisions in the present case.

It must be noted that this decision stands upon the authority of the District Court of Appeals alone. While a writ of certiorari was refused by the Supreme Court of the United States in a memorandum decision, without any opinion, in 275 U. S. 572, the decision derives no support whatever from that fact. In *United States v. Carver,* 260 U. S. 482 at 490, the Supreme Court says, "the denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times".

In view of the foregoing, it appears clearly that it was not intended that a partial certificate under Section 212 should yield to a final certificate for a smaller amount under Section 209(g), without other proof of mistake or fraud in the partial certificate, and that the mere making of a final certificate for a smaller amount does not in itself prove an "overpayment" or create a cause of action for the difference. There is no claim of fraud in this case and it remains to consider whether the evidence conclusively shows mistake, or failure on the part of the Commission to comply with the requirements of the statute in making its partial certificate.

III. *It is not shown conclusively or at all that the Commission issued its partial payment certificate of March 1, 1921, either through mistake or without authority of law.*

(a) *The findings of the lower court have the binding effect of a jury verdict and should not be set aside if supported by competent evidence.*

At the close of the hearing, both parties moved the court for judgment in favor of the respective parties on the sole ground that the record would support no other disposition of the case (R. 21). The court denied the Government's motion and found in favor of the defendant and its finding is equivalent, therefore, to the finding of a jury. *Campbell v. Willis,* 53 App. D. C. 296—citing: *Beuttell v. Magone,* 157 U. S. 154.

In such case the appellate court will not reverse for error of fact, such as a finding contrary to the weight of evidence, but will determine whether the record contains substantial and sufficient evidence to support the finding and judgment. *Glaria v. Wash. So. Ry.,* 30 App. D. C. 559; *B. & O. R. R. Co. v. Miller,* 37 App. D. C. 218; *Federal Intermediate Credit Bank v. L'Herisson* (C. C. A. 8), 33 Fed. (2d) 841, and cases cited in notes; *Vicksburg, Shreveport & Pacific Ry. Co. v. Anderson-Tully Co.,* 256 U. S. 408; *United States v. U. S. Fidelity Co.,* 236 U. S. 512, 527; *Dooley v. Pease,* 180 U. S. 126; *Runkle v. Burnham,* 153 U. S. 216, 225; *Lehnen v. Dickson,* 148 U. S. 71; *Case Mfg. Co. v. Sorman,* 138 U. S. 431, 438; *Hathaway v. Cambridge Nat'l. Bank,* 134 U. S. 494; *Allen v. St. Louis Bank,* 120 U. S. 20, 30.

A reviewing court cannot invade the province of the jury (in this case a judge sitting as a jury) by determining questions of credibility and weight of evidence and then drawing the

conclusion from the residuum of evidence that there is no evidence. *Goldman v. U. S.*, 245 U. S. 474.

(b) *The certificate is lawful in form.*

There is no contention but that the partial certificate was properly signed and in proper form nor that the Commission took the required formal action. It was passed by the Comptroller and cashed by the Secretary of the Treasury without any question. The statute authorized the Commission to act, and upon the face of the record, the Commission did act in full compliance with the statute. The two lower courts have found that there was full compliance with the statute in every respect.

(c) *There is no claim of mistake or error in any item.*

There was no mistake on the part of the Commission in issuing the partial certificate unless it was the mere fact that it acted under the supposition that it would continue to use the same method of computation and that its final certificate would be for a larger amount. To assert that such a mistake as this will invalidate the certificate is to assert that refund must necessarily be allowed if methods are changed or if the final certificate is smaller, no matter how clearly Congress may have expressly declared that refund should not be allowed on this ground alone. Such certificates are necessarily subject to attack for mistake, and if this is a mistake, it means that the partial certificate under Section 212 could not be made binding no matter how clearly Congress might declare that it should be. Certainly it cannot be claimed that the members of the Commission acted under a "mistake" of fact in 1921, merely because they did not then know that they or their successors would subsequently change their opinions or their working methods.

If there was any ignorance in this situation, it was a conscious ignorance. In the nature of things, the Commission on March 1, 1921, could not then know what conclusions it or its successors might draw later on from facts already known. The Commission knew that it was ignorant of the future and Congress knew it; and yet the Commission was required to act and did act in spite of such conscious ignorance. There is no decision under the law of mistake which holds that any such conscious ignorance as this will vitiate any action.

In *United States v. Barlow*, 132 U. S. 271 at 280, the court said:

> "If an allowance is founded upon a clear mistake of fact *not a mere error of judgment*, and payments are in consequence made, the statute provides that 'the postmaster general shall cause suit to be brought to recover such wrong or fraudulent payment of excess with interest', which means that if such mistake be established in the action of the department, a recovery must follow.
>
> * * * * *
>
> It is also true that where the subjects in relation to which the contract of parties is made, are necessarily of an uncertain and speculative character or value, and that is known to the parties, a mere mistake by them in their estimate of the value is not deemed sufficient to authorize a recovery of the monies paid upon the erroneous estimate. If this were a case of that description no recovery could be had." (Italics ours.)

(d) *There was no lack of compliance with the statute.*

The plaintiff contends that the Commission failed to make a "definite ascertainment" as required by the statute. Its evidence and arguments on this point are so interwoven as to be somewhat confusing and can perhaps be clarified by segregat-

ing them under the following headings. Page references are to Petitioner's Brief.

(1) Evidence as to the amount or thoroughness of the Commission's work.

(a) The witness' adjectives, such as cursory, perfunctory, mere estimate, etc., pp. 25, 26, 27.

(b) Statements that the work was not different in character and amount from investigation made for advances under Section 209(h), p. 26.

(2) Evidence going to the intent, purpose or state of mind of the Commission.

(a) That the investigation was not regarded as definite and had no intent of finality, p. 27.

(b) Regarded as similar to investigation for advances under Section 209(h), p. 26.

(c) That the work was performed before Section 212 was passed and before a definite ascertainment was required and was done for other purposes, pp. 28, 30.

(d) That no further work was done after Section 212 was passed, pp. 28, 29.

(3) Evidence that no definite ascertainment was possible.

(a) Because of incomplete information and data, pp. 26, 27.

(b) Because underlying principles unsettled, pp. 29, 30.

(c) Because no agreement made under Section 212(b) as to the net effect of deferred debits and credits, p. 29.

We shall discuss the above contentions in turn.

(a-1) *As to the sufficiency and thoroughness of the Commission's work.*

Opposed to the statements of the plaintiff's witness that the work was cursory and perfunctory and not different in amount or character from investigation for advances under Section 209(h), we have the undisputed facts that the Commission had been engaged in a study of methods and formulae for a year with as many as 40 men employed exclusively on this work (R. 55, 62); that it had had the advantage of two or three years previous study on the same subjects by the Director General and his organization (R. 63); that it had issued three general orders with elaborate forms, instructing the carriers as to the methods of preparing and submitting data (R. 143, 174, 176); that it had 119 pages of such data submitted by the defendant (R. 57); that a force of the Commission's engineers and accountants had paired with representatives of the carrier and had worked all day every day for a week or more in computing the carrier's allowance (R. 59, 60); that a thorough mathematical check of the figures was made (R. 98); that claims for increase in prices were thoroughly checked and corrected (R. 98, 99); that Section 209 specified the methods which the Commission was to follow in making these allowances and the Commission attempted to comply with all these requirements as far as the amount of information and time available would permit (R. 62); that wherever the defendant had followed a method or principle which the Commission considered questionable, a deduction was made to cover it so that only items which were definitely approved were allowed to stand (R. 69). An elaborate four page report showing the result of the Bureau's computations and the deductions which were made with reasons for the same was submitted to the Commission (Ex. C, R. 214-219). The amount of work and the

methods that were followed were the same as in the case of the *final* settlement with the Norfolk Southern a month previous (R. 96-106, 108, 114-116). The investigation was far more thorough than investigations under Section 209(h) because the data consisted of 119 pages instead of only 20 and contained all of the information necessary for a *final* settlement as required by the Commission's general order of October 18, 1920 (R. 57, 58, 143, 190).

In order to test the effect of this evidence as to the amount and character of the Commission's work, apart from any question of *intent*, let us assume that such evidence were offered in an attack upon a final certificate issued under Section 209(g), or an attack on a partial certificate under Section 212, issued long after the statute was enacted and when the Commission's intention to make a definite ascertainment was not in question. Certainly in such a case, testimony of an employe that the work was cursory and perfunctory would have no weight and the case would be dismissed for lack of evidence if no other testimony were offered. The Commission's recital in its own certificate that it had made a definite ascertainment and that the amount could not be reduced by further accounting or otherwise, aided by the presumption that the Commission had done its duty, and supported by evidence such as that outlined above and by the findings of two lower courts, would leave no room for debate. We conclude that the evidence of hasty and insufficient work by the Commission must be disregarded. For the purpose of the next two subdivisions of this argument, and under the lower court's findings, the case must stand, so far as the amount and character of labor expended by the Commission is concerned, exactly as though the certificate were the result of months of the most meticulous and painstaking computations.

(a-2) *As to the intent and purpose with which the work was done.*

Under this heading the plaintiff's witness testified that the Commission's determination was not regarded as definite and had "no intent of finality", but that the intent was to make a mere estimate similar to what had been made for advances under Section 209(h). The witness does not purport to know what was in the minds of the members of the Commission or of his superior officers in the Bureau. He does not purport to have heard any expression from them nor does he show any other foundation for his opinion as to their state of mind.

Opposed to this we have the letter from Chairman Clark of the Commission to the Chairman of the Congressional Committee on January 22nd, more than a month before our certificate was issued, clearly calling attention to the fact that the amounts are to be "definitely ascertained" and that "there is no room for misunderstanding" as to this. We have instructions issued on March 2nd, the day after our certificate, and presumably duly considered long before, stating that "partial payments are not based upon estimates as were advances under Section 209(h) but represent definite ascertainments. * * * Partial payments, being based upon definite determinations and not upon estimates, must be based upon the same character of adjustments as final payments are based upon * * *" (R. 218). And finally we have the declaration of the Commission itself, "In the Matter of Final Settlement under Section 209 of the Transportation Act 1920", 70 I. C. C. 711 at 714 that "We are required to make a definite ascertainment for partial payment purposes as clearly as we are required to make definite ascertainments in final settlements".

The Government relies upon the fact that when the work was being done, Section 212 had not yet been enacted, that there was, therefore, no statutory requirement of a "definite ascertainment" at that time, and that the work was done and determination made for an entirely different purpose and not with the intent of making a definite ascertainment under Section 212, since Section 212 did not exist. There are two answers to this. First, while Section 212 had not yet been enacted, its passage had previously been recommended by the Commission, and its early enactment must have been anticipated. Second, the report made by the Bureau prior to the passage of Section 212 (Ex. B, R. 210-213) and the so-called certificate for credit purposes issued by the Commission on February 23, 1921 (Ex. 1, R. 133) both indicate that they were issued under Section 209(g), and Section 209(g) specifically required a definite ascertainment and not an estimate.

So far as the question of intent or purpose is concerned, therefore, there is ample evidence to support the findings of the lower courts that the Commission intended to make a definite ascertainment.

In order to test the effect of the Government's argument that no further determination was made by the Commission after Section 212 was passed, and that the determination previously made was made for another purpose, let us assume that the Commission had spent months of the most meticulous labor on this one case and had figured to a penny, with the utmost definiteness and certainty, the amount believed to be due—but that all this had been done before the enactment of Section 212, and for the purpose of an advance or a credit certificate or for some purpose other than a "definite ascertainment" under Section 212. Suppose that Section 212 were then enacted, requiring, for the first time in specific statutory terms, a "definite

ascertainment" as a basis for a partial certificate. Could the Commission then adopt its previous computations and its previous determination as a "definite ascertainment" under the new statute? Or would the fact that that previous determination had been made with another purpose in mind destroy its value entirely, and require that it be scrapped and that the same identical calculations be repeated and duplicated over another period of months in exactly the same way in all respects, except with a different purpose in mind? To ask the question in this way is to answer it. If the Commission, in doing its previous work, had regarded it as accurate and certain, the fact that it was originally done for some other purpose would clearly be immaterial. Upon the enactment of the new statute, the Commission would find itself already sufficiently informed and with sufficient data and computations at hand to make at once a "definite ascertainment" under the terms of the statute. The fact that the information might have been obtained and the computations made for a different purpose would be immaterial. We would have to regard the case exactly as though the same amount of investigation had been made *after* the enactment of the statute.

It is true that in this case the Commission's previous investigation of Great Northern records had covered only days and not months, but since the lower court has found that there was no non-compliance with the statute so far as quantity of work is concerned, the effect is the same. There are no degrees of compliance with the statute. Therefore, when the Commission issued its certificate of March 1st, adopting its previous determination as a definite ascertainment under Section 212, the purpose for which the original determination was made becomes entirely immaterial. So far as the accuracy of that prior work is concerned, it would stultify both the Bureau

and the Commission to assume that they were deliberately less careful or less accurate because the certificate was to be used in obtaining money from the banks instead of from the Government.

(a-3) *As to the alleged impossibility of making a definite ascertainment because of insufficient data or unsettled principles.*

In support of its contention that there was insufficient data, the Government argues on pages 26 and 27 of its brief that our books had not been closed, that there were still numerous outstanding accounts subject to adjustment, and that the data submitted with the claim was frequently revised and augmented later. It is true that there were reserve accounts and unaudited items upon our books, covering such matters as unsettled damage claims, uncollected revenues and the like, but at the time the partial payment was made, such items then remaining on our books amounted to only $200,000 (R. 66). After determining that $15,705,688 would be due us, the Commission made an arbitrary deduction of more than three million dollars before issuing its certificate for $12,500,000. This was far more than sufficient to cover all unaudited items.

Moreover the accounting rules of the Commission permit and require such reserve accounts and all railway companies must have them (R. 64). There were similar unadjusted accounts upon the books of the Norfolk Southern when it received its final certificate under Section 209(g) (R. 115), and upon the books of the Great Northern when our final certificate was issued in July, 1926 (R. 66). Moreover, in enacting Section 212(b), Congress expressly recognized the fact that there must be deferred debit and credit items upon the books of the carrier and expressly provided that this situation should not be a

bar to payment but that such items might be covered by an estimate.

As to the testimony that the data submitted with our claim was frequently revised and augmented later, it appears that the only revisions which were made were, first, in statements covering items previously in reserve accounts, and, second, in additional data furnished by the carrier at the request of the Commission (R. 108). The carrier never voluntarily amended its claim and no errors were ever developed in the data originally furnished to the Commission (R. 109).

It is true that the Commission had not sent its accountants into our general offices to check our books, but nothing of the sort was required under the law, and neither was this done prior to the *final* settlement with the Norfolk Southern Railway (R. 115). When the Commission finally checked our books in 1923, the total exceptions amounted to only $351,492.35 or only a little more than 10% of the arbitrary deduction which had been made by the Commission (R. 53, 54). There is no evidence that these exceptions taken by the Commission were correct, or that there was in fact any error in any amount whatever upon our books.

That the Commission considered itself in a position to make a definite ascertainment without any check of our books, and in spite of the unaudited items, is evidenced by the fact that it offered to give us a certificate for final settlement in place of our certificate for partial payment, if we would waive certain unsettled questions (R. 108).

On pages 29 and 30 of its brief, the Government argues that a definite ascertainment was impossible because the Commission itself had not determined upon many of accounting and other principles to be followed in making its final ascertainment. In support of this it cites two general decisions of the

Commission made later, establishing certain methods and principles.

The statute did not require the Commission to make a general announcement of all or any of its methods and principles before making definite ascertainments in individual cases. It had made final settlement with at least four carriers before any of the general decisions cited by the Government were issued. 65 I. C. C. 798; 67 I. C. C. 713, 726, 729. It had made final settlements with more than 100 carriers before August 15, 1923, the date of the last of these general decisions in 82 I. C. C. 678. (36th Annual Report of the Interstate Commerce Commission, 1922, pages 223- 226, inclusive). It had offered the Great Northern a certificate of final settlement at the time when the partial certificate was issued (R. 108).

In *Maintenance Expenses under Section 209*, 70 I. C. C. 115 at 127, decided July 12, 1921, the Commission issued a general decision upon the two major questions then before it, denying any allowance for so-called ineffectiveness of labor and refusing to increase depreciation charges because of increase in prices. In this decision, the Commission said, "This report deals with the two major questions which have been in dispute and which were argued before the full Commission last December. Minor questions are appropriately left to be determined as they arise in specific cases". In other words, the Commission itself recognized that it could decide questions of principle in specific cases as well as by general decisions.

The Commission had been engaged in a study of methods and principles for more than a year before the date of our partial certificate and had had as many as 40 men employed in this work (R. 55, 62). It had had the benefit of two or three years previous study of the same subject by the Director General (R. 63). Clearly, it considered itself to be and it was in a

position to determine what methods and principles should be followed, and to make definite ascertainments, without making any previous general decisions announcing its methods.

When it examined our claim, it was fully advised as to the methods and principles which had been followed in computing it. Items were rejected not only when the methods which had been followed were disapproved, but even where they were in question and had not been definitely approved. Everything that had not been approved and that was in question was disallowed (R. 69). Clearly, this amounted to the adoption in our case of definite methods and principles, even though there had been no previous announcement of them.

It is not shown that either of the two later general decisions cited on pages 29 and 30 of the Government's brief changed in any way the methods which were followed in making our partial certificate. There is not one word of evidence anywhere in the record that any rule, method or principle promulgated in either of these decisions was in any way different from the rules, methods and principles followed in our determination. Our claims for ineffectiveness of labor and for increase of depreciation charges were rejected in computing the amount of our partial certificate, and this was in accordance with the Commission's later decisions (R. 67).

The only later general decision which is shown to have promulgated any different methods or principles was the decision of December 15, 1921, "In the Matter of Final Settlement under Section 209 of the Transportation Act, 1920", 70 I. C. C. 711, which is not cited by the Government. This was the decision by which the Commission abandoned the method of determining precise increases for each group of expenses, and substituted the method of applying general territorial averages to the expense as a whole, in determining increases

in the cost of labor and materials. As to this there was no unsettled question before the Commission when our partial certificate was made, as at that time no one had suggested the use of a general or territorial average, and the propriety of applying precise increases to separate groups of expenses had never been questioned (R. 98). Other similar changes in method were in fact used later but were not announced in any general decisions, and there is no evidence that any of them were considered unsettled or under consideration at the time of our partial certificate.

The entire evidence on this phase of the case shows nothing more than the mere fact that as the work of the Commission proceeded, it abandoned more and more the method of precise calculation and adopted more and more the use of "judgment factors" and general averages, and occasionally made general announcement of *some* of its methods. There is not one word of evidence in the record that the original determination in our case included any inaccuracy or error, that any item was erroneously included or computed, or that the methods later used were more accurate, or that any methods or principles used in computing our partial certificate were unsettled or in question at the time. On the contrary, every item that involved any method or principle then in question was rejected (R. 79). The fact that the methods used later produced a result three and a half million dollars less than the method by precise calculation, and five million dollars less than our actual expenditures suggests that the methods later used were ridiculously inadequate.

On page 29 of its brief, petitioner asserts that the Commission failed to eliminate deferred items from our claim or to reach an agreement with the carrier as to the net effect of deferred items, and that this was in violation of Section 212(b)

and so invalidated the certificate. But at the time of our certificate, the deferred items remaining on our books amounted to only $200,000 (R. 66). The Commission arbitrarily deducted $3,205,688 from our total claim before making its certificate (R. 215). Section 212(b) imposed no *obligation* upon the Commission to allow anything at all for deferred items or to enter into any agreement regarding them. It merely "authorized" the Commission to do so "whenever in its judgment practicable". As long as a deduction was made, far in excess of the amount of the deferred items, before certifying the balance, there can be no complaint upon this ground.

We conclude that there was no impossibility of making a definite ascertainment but that the Commission could and did make final settlements as well as partial payments at that time; that its computation was sufficiently thorough and accurate for a definite ascertainment; and that there is ample evidence of the intent and purpose of the Commission to make a definite ascertainment. Its first certificate for "credit" purposes purported to be made under Section 209(g) which required a definite ascertainment, and when the second certificate was issued on March 1, 1921, the Commission specifically adopted its previous computations as a definite ascertainment under Section 212.

In its opinion below, the Court of Appeals said (R. 237, 238):

> "We think that, under the authority lodged in it by the act of February 26, 1921, the Interstate Commerce Commission, at the time the partial certificate in controversy was issued, had full power, in its discretion, to adopt and act upon the information and data before it respecting computations to be made in arriving at the definite ascertainment required by the law and that it did so. The record discloses no mistake either of fact or law, nor that the commission exceeded its authority under the remedial

statute. It took affirmative action within the scope of its authority, with no misconception or misconstruction of the terms of that statute, and with full knowledge of the existing facts essential to the determination it was called upon to make. No fraud or collusion is, or could be, claimed. Its conclusion, as evidenced by its certificate of March 1, 1921, is deemed to be conclusive.

* * * * *

Because of the importance of the issues involved, we have carried this discussion beyond the limits required for a determination of whether the record discloses subsantial evidence sufficient to support the finding and judgment of the trial court. Our conclusion is that not only is the judgment supported by substantial evidence, but that, upon the whole record, that judgment should be affirmed. It is so ordered."

CONCLUSION.

If the Commission had adopted the practice of determining the amounts of its *final* certificates by first employing accountants and engineers to compute the allowance by a complete mathematical check, eliminating every doubtful item, and then, to make certainty doubly certain, had made a large arbitrary deduction of 20% before "definitely ascertaining" the balance, there could be no contention that they had thereby abused the discretion reposed in them. This process would be regarded only as an excess of caution and certainty. None of the grounds of attack which we face here would be seriously presented against such a *final* certificate. And yet if we are sound in Part II of this brief in arguing that the certificate under Section 212 was to be as definite and conclusive *pro tanto* as certificates under Section 209(g), these same grounds of attack should be given no more consideration here, especially after

two lower courts have passed upon them adversely. We respectfully ask that the judgment be affirmed.

Respectfully submitted,

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APPENDIX.

Section 209 of the Transportation Act, 1920, c. 91, 41 Stat. 464, 465, 466 (U. S. C., Title 49, sec. 77), provides, in part:

SEC. 209(a). When used in this section—

The term "carrier" means (1) a carrier by railroad or partly by railroad and partly by water, whose railroad or system of transportation is under Federal control at the time Federal control terminates, or which has heretofore engaged as a common carrier in general transportation and competed for traffic, or connected, with a railroad at any time under Federal control; * * *.

The term "guaranty period" means the six months beginning March 1, 1920.

The term "test period" means the three years ending June 30, 1917; * * *.

(b) This section shall not be applicable to any carrier which does not on or before March 15, 1920, file with the Commission a written statement that it accepts all the provisions of this section.

(c) The United States hereby guarantees—

(1) With respect to any carrier with which a contract (exclusive of so-called co-operative contracts or waivers) has been made fixing the amount of just compensation under the Federal Control Act, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than one-half the amount named in such contract as annual compensation, * * *.

* * * * *

(f) In computing railway operating income, or any deficit therein, for the guaranty period for the purposes of this section—

* * * * *

(3) There shall not be included in operating expenses, for maintenance of way and structures, or for maintenance

of equipment, more than an amount fixed by the Commission. In fixing such amount the Commission shall so far as practicable apply the rule set forth in the proviso in paragraph (a) of section 5 of the "standard contract" between the United States and the carriers (whether or not such contract has been entered into with the carrier whose railway operating income is being computed);

* * * * *

(5) The Commission shall require the elimination and restatement of the operating expenses and revenues (other than for maintenance of way and structures, or maintenance of equipment) for the guaranty period, to the extent necessary to correct and exclude any disproportionate or unreasonable charge to such expenses or revenues for such period, or any charge to such expenses or revenues for such period which under a proper system of accounting is attributable to another period.

(g) The Commission shall, as soon as practicable after the expiration of the guaranty period, ascertain and certify to the Secretary of the Treasury the several amounts necessary to make good the foregoing guaranty to each carrier. The Secretary of the Treasury is hereby authorized and directed thereupon to draw warrants in favor of each such carrier upon the Treasury of the United States, for the amount shown in such certificate as necessary to make good such guaranty. An amount sufficient to pay such warrants is hereby appropriated out of any money in the Treasury not otherwise appropriated.

(h) Upon application of any carrier to the Commission, asking that during the guaranty period there may be advanced to it from time to time such sums, not in excess of the estimated amount necessary to make good the guaranty, as are necessary to enable it to meet its fixed charges and operating expenses, the Commission may certify to the Secretary of the Treasury the amount of, and times at which, such advances, if any, shall be made. The Secretary of the Treasury, on receipt of such certificate, is au-

thorized and directed to make the advances in the amounts and at the times specified in the certificate, upon the execution by the carrier of a contract, secured in such manner as the Secretary may determine, that upon final determination of the amount of the guaranty provided for by this section such carrier will repay to the United States any amounts which it has received from such advances in excess of the guaranty, with interest at the rate of 6 per centum per annum from the time such excess was paid. There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, a sum sufficient to enable the Secretary of the Treasury to make the advances referred to in this subdivision.

* * * * *

The Act of February 26, 1921, c. 72, 41 Stat. 1145 (U. S. C., Title 49, sec. 79), provides:

That the Transportation Act, 1920, is hereby amended by adding after section 211 a new section to read as follows:

"SEC. 212. (a) In making certifications under section 204 or section 209, the Commission, if not at the time able finally to determine the whole amount due under such section to a carrier or the American Railway Express Company, may make its certificate for any amount definitely ascertained by it to be due, and may thereafter in the same manner make further certificates, until the whole amount due has been certified. The authority of and direction to the Secretary of the Treasury under such sections to draw warrants is hereby made applicable to each such certificate. Warrants drawn pursuant to this section, whether in partial payment or in final payment, shall be paid: (1) If for a payment in respect to reimbursement of a carrier for a deficit during the period of Federal control, out of the appropriation made by section 204; (2) if for a payment in respect to the guaranty to a carrier other than the

American Railway Express Company, out of the appropriation made by subdivision (g) of section 209; and (3) if for a payment in respect to the guaranty to the American Railway Express Company, out of the appropriation made by the fifth paragraph of subdivision (i) of section 209.

"(b) In ascertaining the several amounts payable under either of such sections, the Commission is authorized, in the case of deferred debits and credits which can not at the time be definitely determined, to make, whenever in its judgment practicable, a reasonable estimate of the net effect of any such items, and, when agreed to by the carrier or express company, to use such estimate as a definitely ascertained amount in certifying amounts payable under either of such sections, and such estimates so agreed to shall be prima facie but not conclusive evidence of their correctness in amount in final settlement.